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Supreme Court of the United States

OCTOBER TERM, 1941.

314-617

No. 520.

CASSIUS McDONALD, PETITIONER,

VS.

ROBERT H. HUDSPETH, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI, BRIEF AND SUGGESTIONS IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED.

Your Petitioner, Cassius McDonald, respectfully alleges:

This case challenges the validity of the trial and conviction of Petitioner in the United States District Court for the District of Minnesota, as an alleged conspirator to kidnap one Edward George Bremer in violation of the provisions of that certain Act of Congress approved June 22, A. D. 1932, forbidding the transportation of any person in interstate or foreign commerce, who shall have been kidnapped, or otherwise unlawfully detained (18 U. S. C. A., Sec. 408 (a) (c)).

The indictment charged:

> "That heretofore, to-wit: Between September fifteenth, A. D. 1933, or thereabouts, and January fifteenth, A. D. 1935, or thereabouts, the Grand Jurors being unable to fix the period of time more definitely, at the City of Saint Paul, in the County of Ramsey, in the State and District of Minnesota, and within the jurisdiction of this Court, and elsewhere in said State and District of Minnesota at places therein unknown to the Grand Jurors, and at the town or city of Bensenville, in the County of Du Page, in the State of Illinois, and elsewhere in said State of Illinois at places therein to the Grand Jurors unknown, and at various other places specifically mentioned hereinafter,
>
> One Alvin Karpavicz, alias Alvin Karpis, and
> One Arthur Barker, alias 'Doc' Barker, and
> One Volney Davis, and
> One Harry Campbell, alias George Winfield, and
> One William Weaver, alias Phoenix Donald, and,
> One William J. Harrison, and
> One Harry Sawyer, alias Harry Sandlovich, and
> One Byron Bolton, alias Monty Carter, and
> One Elmer Farmer, and
> One Harold Alderton, alias Harold Allerton, and
> One Cassius McDonald, alias 'Cash' McDonald,

then and there being, all of the foregoing persons being defendants herein and hereinafter being referred to individually and/or collectively as 'defendants', unlawfully did conspire, confederate and agree together and with each other and with various and divers other persons then and there being whose names are unknown to the Grand Jurors and with the following late decedents, namely

One Fred C. Goetz, alias George Ziegler, and
One Fred Barker,

both of whom were living beings during the period of time hereinbefore alleged, to violate the provisions of that certain Act of Congress approved June 22, A. D. 1932, 'Forbidding the transportation of any person in interstate or foreign commerce, kidnap, or otherwise unlawfully detained * * *' "

Then followed a detailed statement of the acts of the conspirators which, in substance, charged a conspiracy to kidnap Edward George Bremer in the city of St. Paul, Minnesota, the selection of a hide-out outside of the State of Minnesota, and his transportation thereto and retention therein. It was agreed that they would hold him for a ransom of $200,000; that they would communicate by means of notes and letters with friends of the victim with reference to the payment of the ransom money and his release; that after the payment of the ransom money they would return the victim secretly by automobile to the State of Minnesota from their hide-out in the State of Illinois; that after having collected the ransom money, in order to avoid discovery and arrest in connection therewith and to the end that they might safely realize and enjoy the profits and fruits of their crime, they would convert the ransom money at various places in the United States and Cuba, deemed by them to be propitious for that purpose, into other money and currency which they would be able to negotiate and pass readily and with safety to themselves in the regular and ordinary channels of trade, commerce and business; and that to accomplish the conversion and disposal and exchange of the

ransom money they would aid, abet, assist and counsel one another, in that connection and to that end.

The indictment set forth fourteen overt acts committed in consummation of the conspiracy. Overt Act 11 charged that on September 2, 1934, Petitioner traveled from Miami, Florida, to Havana, Cuba, to negotiate the exchange of ransom money. Overt Act 12 charged that on September 5, 1934, at Havana, Cuba, Petitioner exchanged a portion of the ransom money paid to defendants for the release of Edward George Bremer, for $11,000 more or less, in gold. Overt Act No. 13 charged that on September 9, 1934, Petitioner and defendant William J. Harrison traveled from Miami, Florida, to Havana, Cuba, to negotiate for the exchange of ransom money paid for the release of Edward George Bremer. Overt Act No. 14 charged that on September 10, 1934, at Havana, Cuba, Petitioner exchanged $72,000 more or less, of ransom money paid to defendants for the release of Edward George Bremer for other currency of the United States of One Thousand and Five Hundred Dollar denomination.

Petitioner was tried jointly with two other defendants. He was found guilty and appealed from the judgment and sentence of the court to the Eighth Circuit Court of Appeals, where his conviction was affirmed. *McDonald* v. *United States,* 89 F. 2d 128.

After the affirmance of the conviction by the Eighth Circuit Court of Appeals, Petitioner applied to the Supreme Court of the United States for a Writ of Certiorari, which was denied, and thereafter a plea of his wife addressed to the Supreme Court of the United States was treated as a Writ of Coram Nobis and was denied.

At no point in those proceedings were the questions, later presented on petition for Writ of Habeas Corpus, presented to any court. The then attorneys for Petitioner did not raise the questions later raised on Petition for Writ of Habeas Corpus, and raised in this Petition for Writ of Certiorari.

After his indictment, *supra*, on September 27, 1935, in the District of Minnesota, Petitioner was tried in the United States District Court at St. Paul, Minnesota, in January, 1936, and was, on the 26th day of January, 1936 convicted, and thereafter sentenced to fifteen years in the Federal Penitentiary at Leavenworth, Kansas. In 1938, as soon, so this Petitioner alleges, as he was permitted by the rules of said prison to do so, he filed his Petition for Writ of Habeas Corpus in the United States District Court for the District of Kansas (R. 9), as first amended (R. 21), as supplemented (R. 25), and as second amended (R. 28). Testimony was taken extensively and hearings had, and on the 6th day of June, 1940, a Writ of Habeas Corpus was issued by the United States District Court for the District of Kansas, and Petitioner was discharged on a recognizance bond. The Government appealed from such decision to the United States Circuit Court of Appeals for the Tenth Circuit, which Court on the 12th day of June, 1941, reversed the trial court and directed the return of the Petitioner to the Warden of the United States Penitentiary at Leavenworth, Kansas.

The trial of Petitioner in the United States District Court for the District of Minnesota developed these facts:

1. The United States Attorney stated in open court that Petitioner had nothing whatever to do with the actual kidnapping of Bremer.

2. The Petitioner was not heard of in connection with the case in any way until the dates on which it was alleged he committed the overt acts charged in the indictment in September, 1934, some eight months after the kidnapping took place.

3. No evidence was offered by the Government that Petitioner, or anyone for him, had any communication in any form with anybody at any time or place in connection with the kidnapping, or with anyone connected

with the kidnapping, either before or after the kidnapping *except* exceedingly scant proof was offered that Petitioner was casually with one or two of the kidnappers in Miami, Florida, in September, 1934, at about the time he was alleged to have committed the overt acts, with the doing of which he was charged in the indictment, but no proof was offered that Petitioner knew them as such, and they in fact had other names.

4. That Petitioner did go from Miami, Florida, to Havana, Cuba, on the dates charged in the indictment, and did there exchange money as charged in the indictment, but there was no proof offered that the money so exchanged was in fact ransom money used in the Bremer kidnapping, except some length of time thereafter, there was found in the Cuban Treasury $12,700 of the ransom money under a paper band, serving the function of an elastic, which packet of money had come from one of the banks in Cuba at which Petitioner had in fact exchanged money, but no proof was offered that he in fact exchanged that particular money, or that he knew it was ransom money.

5. That one Jennings, who was employed by Petitioner's wife as counsel for Petitioner, was continuously drinking, and was drunk throughout the trial of Petitioner.

6. That Petitioner asked and received permission to substitute other counsel, but other counsel did not show up.

7. That Petitioner did not at any time waive his right to have counsel, but on the contrary did all he could to procure competent counsel.

It further appears from the evidence taken in the habeas corpus proceeding:

1. That Petitioner was not permitted by his counsel (drunk) to take the stand in his own defense to explain his actions;

2. That Petitioner's drunken counsel declined to use witnesses who had been procured by the wife of Petitioner, and who, if used, would have shown by oral and documentary proof that Petitioner had for a long number of years conducted a legitimate business in Cuba (*i. e.*, he and others owned—Petitioner by inheritance from his father—the gambling concessions granted and sold by the Cuban government), and was, in September, 1934, on the dates charged in the overt acts in the indictment, in Florida and Cuba in connection with such business, and, specifically to make required payments on a mortgage on such business, and it was necessary in the conduct of such business for Petitioner to handle large sums of money, which he commonly did, and had been doing for a long number of years, which sums were handled by Petitioner in the cages of the banks in Cuba, he being known to and being friendly with all the bank officials there and officers of the Cuban government.

3. That Petitioner was also indicted in Florida, prior to his indictment in Minnesota, but was not there tried, his indictment being dismissed after his conviction in Minnesota, but others indicted with Petitioner at the same time in Florida were tried there, and the trial court instructed a verdict of acquittal at the close of the Government's case;

4. That defense counsel for otners indicted and tried at the same time in the United States District Court for the District of Minnesota gave their depositions in the habeas corpus proceedings, wherein they definitely say that Jennings, Counsel for Petitioner, was constantly drinking and was drunk throughout the trial of the case, and that in their opinion, Petitioner did not have assistance of counsel in the trial of the case there;

5. That whilst Petitioner was charged with a conspiracy, the only proof was of an overt act in Florida and Cuba, which overt act was the passing of ransom money,

which act was not at the time of commission in itself a crime, and did not become so until January, 1936, on the very day of the close of the trial of Petitioner in St. Paul, Minnesota, when Congress amended the Kidnapping Act in that particular (18 U. S. C. A. 408c as amended January 24, 1936).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner sought release on habeas corpus on the grounds:

1. That the United States District Court for the District of Minnesota had no jurisdiction of the offense charged against him for the reason that, whilst the indictment charged a conspiracy in Minnesota, no conspiracy was proved there. If a conspiracy were proved at all, which Petitioner denies, the verdict of the jury to the contrary notwithstanding, it was proved in Florida and/or Cuba and not in Minnesota, and that while trial venue may be laid *either* where the conspiracy *or* the overt act is executed, a trial court may not *retain* jurisdiction to sentence one charged with a crime unless a crime (*i. e.*, conspiracy here) is proved to have taken place in the District wherein the trial is being held.

2. That the United States District Court for the District of Minnesota had no jurisdiction to sentence Petitioner for the further reason that Petitioner did not have effective assistance of counsel, and did not waive assistance of counsel.

Supreme Court of the United States

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No. .....

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the court below has not yet been officially reported. It appears at pages.....to.....of the record. An application for rehearing was denied without opinion (R. ____).

II.

JURISDICTION.

1.

The Sixth Amendment to the Constitution of the United States, among other things, provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, * * * and to have the assistance of counsel for his defense."

2.

Petitioner was discharged on a Writ of Habeas Corpus, issued by the United States District Court for the District of Kansas on June 6, 1940. Appeal was taken by the Government to the United States Circuit Court of Appeals for the Tenth Circuit, and on June 12, 1941, that court duly filed its opinion wherein it reversed the trial court and ordered the return of the prisoner to the Warden at the United States Penitentiary at Leavenworth, Kansas. Petition for rehearing was duly filed and by the Circuit Court of Appeals denied without opinion on the 17th day of July, 1941.

3.

The reasons relied upon for the allowance of the writ are that the United States District Court for the District of Minnesota had no jurisdiction to sentence the prisoner, because no proof was offered of any conspiracy in Minnesota as charged in the indictment, and therefore no proof thereof made, and that the Petitioner did not have, and did not waive the right to have, the assistance of counsel, all as provided in the Sixth Amendment to the Constitution of the United States.

A.

Venue of Trial.

It is true, as stated in the opinion of the Tenth Circuit Court of Appeals, that McDonald was *charged* in the indictment with conspiracy in Minnesota and in Illinois. It is true, also, that overt acts were *charged* in Florida and in Cuba—*but not in Minnesota or in Illinois.*

It is true that on the trial of Petitioner in Minnesota the government absolved Petitioner from any connection of any kind with the actual kidnapping. Thus the only proof made or sought to be made against Petitioner was the commission of the overt acts in Florida and Cuba. It is stated in the opinion of the Tenth Circuit Court of Appeals that because *overt acts* were proved in Florida and Cuba (with no proof whatever anywhere in the record of any conspiracy in any manner in Minnesota or Illinois as charged in the indictment) that that perforce proves a conspiracy in Minnesota or Illinois as charged in the indictment. That, we respectfully suggest, is a pure fiction; and, we also respectfully suggest, is not, and should not be, the law. The Tenth Circuit Court of Appeals has completely overlooked the opinion of this Court in the case of *Brown* v. *Elliott, U. S. Marshal,* and *Moore* v. *Elliott, U. S. Marshal,* 32 S. Ct. 812, wherein it was said, *inter alia*:

> "In the case of *Brown* v. *Elliott, United States Marshal,* and *Moore* v. *Elliott, United States Marshal,* 32 S. Ct. 812, a conspiracy was charged against defendants to defraud certain persons of money by staging and executing fixed horse races. Brown and Moore were apprehended in California; and, upon petition for writ of habeas corpus, the petition was denied by the lower court, affirmed by the Ninth Circuit Court of Appeals, and affirmed by the United States Supreme Court. The indictments charged that the *place* of conspiracy was unknown but that it was *executed* in Nebraska. The question was whether or

not the venue of the case should be laid in Nebraska. The Supreme Court in affirming the Ninth Circuit said (l. c. 815):

> 'As the place of the overt act may be the place of jurisdiction, it follows that the exact place where the conspiracy was formed need not be alleged. This case illustrates the evil which a contrary ruling would cause. The place where the conspiracy was formed was unknown to the grand jurors (and might be so in many cases), but it was intended to be executed in a number of states of the Union, and yet, under the rigor of the contention of appellants, the conspirators could not be tried in any of them. In other words, not the place of the activities of the conspiracy and where it incurs guilt, but the place of its formation, which no one may know or can find out, is the place of the jurisdiction of its trial. And what compels this? It is answered: The Sixth Amendment of the Constitution of the United States. We have determined otherwise in *Hyde* v. *United States.*
>
> *'The Constitution of the United States is not intended as a facility for crime. It is intended to prevent oppression; and its letter and its spirit are satisfied if, where a criminal purpose is executed, the criminal purpose be punished. It is there that its victims are sought and defrauded. It is there that its perpetrators should be brought to the bar of justice for their acts; not for the mere conception of them, but for the actual execution of them. The venue of his trial is thus made by the criminal himself, not determined by reasons or interests which may be adverse to him and used to his injury'* (emphasis ours)."

The Tenth Circuit Court of Appeals is in error also in saying that

> "While it is necessary to allege and prove an overt act, the overt act does not constitute the offense." *Gonkler* v. *U. S.*, (C. C. A. 3rd) 294 Fed. 274, 276.

The Tenth Circuit Court of Appeals says in its opinion (pp. 6-7):

> "* * * The gist of the offense of a conspiracy is an agreement among the conspirators to commit an offense, attended by an overt act by one or more of the conspirators to effect the object of the conspiracy, *United States* v. *Falcone*, 311 U. S. 205, *and the venue may be laid either where the conspiracy was formed or where any overt act in furtherance thereof was committed. Hyde* v. *United States*, 225 U. S. 374, 32 S. Ct. 793, 56 L. Ed. 1114; *Chew* v. *United States*, 8 Cir., 9 F. 2d 348; *Sloan* v. *United States*, 8 Cir., 31 F. 2d 902; *Yenkicki Ito* v. *United States*, 9 Cir., 64 F. 2d 73, 76; *Shea* v. *United States*, 6 Cir., 236 Fed. 97, 101. The court in whose district the conspiracy was formed has jurisdiction to try the defendants, even if no single overt act was committed within its boundary. *Brown* v. *Elliott*, 225 U. S. 392, 402, 32 S. Ct. 812, 56 L. Ed. 1136; *Hyde* v. *United States, supra*; *Hyde* v. *Shine*, 199 U. S. 62, 76, 25 S. Ct. 750, 60 L. Ed. 90; *Shea* v. *United States, supra*; *United States* v. *Wells*, 2 Cir., 192 Fed. 870" (emphasis ours).

We agree.

The venue may be laid *either* where the conspiracy was formed, or where any overt act in furtherance thereof was committed. If the venue be laid where the conspiracy is *charged* to have taken place, then *proof of conspiracy* must be made to give the court trying the case jurisdiction. If not made, then the jurisdiction fails, because the venue is not proper, no crime having been proved to have been committed in that District. But what happened in this case? The record may be searched in vain for any evidence that this Petitioner was at any time in Minnesota or Illinois, as charged in the indictment, or had any communication in any manner or form with anyone in either state at any time. No presence of Petitioner in Minnesota or Illinois. No communication of any kind or by any means by Petitioner or anyone for him with anyone at any time in Minnesota or Illinois. Hence there could be no con-

spiracy *formed,* as charged, in Minnesota where he was tried. To say there was, merely because an overt act was charged and proved in Florida and Cuba, is a pure fiction. It has no substance in reason or intellectual concept.

What did occur?

The overt acts were proved in Florida and Cuba. What is the venue in such case? *Vide Brown* v. *Elliott, etc., supra.*

If one may be charged with *conspiracy* in Minnesota as in this case, and the trial there show a complete absence of proof of any kind as to *conspiracy* there, and be convicted because an *overt act* was committed in Florida, and then such conviction be sustained because of the fiction that the proof of the overt act is proof of conspiracy, then indeed one may be so charged and tried in any district court in the United States from the Pacific to the Atlantic and from the Gulf to Canada, and this in the face of the positive provision in the Sixth Amendment to the United States Constitution to the contrary. Under these circumstances one may wholly innocently, as it is asserted is true in this case, commit an act otherwise lawful (*i. e.,* changing money) at Point A (Florida), and be charged and tried in a jurisdiction hundreds of miles away, at Point B (Minnesota), of an altogether different crime (*i. e.,* conspiracy), when in fact there is no proof even offered that one did in fact conspire, except the proof that one committed an overt act in a foreign jurisdiction.

If that is the law, then the provision of the Sixth Amendment that one must have a speedy trial in the district wherein the crime shall have been committed no longer obtains. It is a nullity.

Suppose no overt act had been proved. Will this court say that Petitioner could have been convicted of conspiracy? No, of course not. One is not convicted on a charge. The charge must be proved. May proof be made of a conspiracy, which word and crime connotes some sort of consultation or communication, between the alleged conspirators, by *mere* proof that one of those charged

as being a conspirator did an altogether innocent act (*i. e.*, changed money in Florida or Cuba—not the place of trial —which act in itself was not a crime at the time of commission or at any time, unless the money so changed was in fact ransom money, and known to be such by the person committing the act, which was not even attempted to be proved in this case) in a jurisdiction foreign to the place of trial? In all reason that should not be the law. It nullifies the 6th Amendment to the United States Constitution.

It must be remembered that the Government could have tried this Petitioner in Florida, but it chose to try him in Minnesota, the home of the person kidnapped, where the populace was inflamed, and the stage set, with two other persons, both of whom had long criminal records and had in fact participated in the kidnapping. This is not the kind of justice with which we have long been familiar, and is the direct antithesis of what is designed by our Constitution and laws.

B.

Assistance of Counsel.

The Tenth Circuit Court of Appeals has said in its opinion, in referring to the drunkenness of Jennings, counsel for Petitioner (p. 11):

> "The most that can be said for this testimony is that it establishes that appellee's counsel drank throughout the trial and that he was under the influence of intoxicating liquor to a greater or less degree during the whole trial. But what of it? * * *"

Surely an appellate court does not mean to say, so nonchalantly and literally, "But what of it?" with all the implications which that phrase in that connection carries with it. Is it the law that where a prisoner's life and liberty are at stake—a layman, not versed in the law, and wholly unacquainted with pleading and court

room procedure—a drunken lawyer may be permitted, without interference by the court, to represent the layman, and not, as is definitely shown in this case, make a pretense of letting the prisoner's story even be told? Surely not. The Tenth Circuit Court of Appeals says in its opinion (p. 12):

> "There is a vast difference between lacking the effective assistance of competent counsel and being denied the right to have the effective assistance of competent counsel." * * *

We respectfully disagree, if that court means to say the distinction drawn is determinative of the prisoner's right. There is a distinction, but it is a distinction without a difference in so far as the prisoner's rights are concerned. Mere presence of counsel does not satisfy the Sixth Amendment to the Constitution. *Avery* v. *State of Alabama*, 308 U. S. 444, 60 S. Ct. 321.

Suppose a deaf and dumb man were the prisoner. Are his rights not to be protected by the court? Such a prisoner can neither waive nor demand counsel. Is there no duty cast upon the court? Of course, there is. The court cannot sit supinely on the bench and take no action. Why? Because the Constitution says "assistance of counsel." It is the court's duty to see that there is *assistance* of counsel—not merely *presence* of counsel. What does *assistance* of counsel mean? It means *effective assistance. Thomas et al.* v. *District of Columbia*, 90 F. 2d 424 (U. S. C. A. for D. C., 1937); *Powell* v. *Alabama*, 287 U. S. 45, 68-71, 53 S. Ct. 55, 77 L. Ed. 158, 83 A. L. R. 527; *Johnson* v. *Zerbst*, 304 U. S. 458, 58 S. Ct. 1019.

If an appellate court is to be permitted to say, as we believe the Tenth Circuit Court of Appeals has said, but inadvertently, when it said, "But what of it?" that a drunken counsel can meet the requirements of *Johnson* v. *Zerbst, supra*, then we most emphatically, but respectfully, disagree. A counsel, drunk, who does not permit his client to be heard, though he requests it, is, in all

reason, not assisting his client. His client has no "due process of law," which phrase is difficult to define, and perhaps impossible of definition, but which Webster says means "a law which hears before it condemns." *Fleenor* v. *Hammond*, 116 F. 2d 982, 985; *Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55.

In the case of *Achtien* v. *Wood*, 117 F. 2d 989, 992 (7th Cir., Evans, J.) (Feb., 1941), it was said:

> "It would seem tolerably clear that an accused is entitled, if he desires counsel, not only to be represented by one admitted to the bar, but to be represented by competent counsel—by a capable practitioner."

Is this court to say that a drunken lawyer is a *competent* one? No.

In the recent case of *Avery* v. *State of Alabama*, 308 U. S. 444, 60 S. Ct. 321, Mr. Justice Black, at page 322, stated:

> "But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."

So here can it be said that a drunken lawyer could "assist" the Petitioner? It must be remembered that the Petitioner was not permitted to take the stand, by his counsel, in his own defense, and his witnesses were sent away by his counsel and not used. Has a trial court any duty to see to it that counsel perform their services? Of course it has. The mere presence of an attorney for the accused does not satisfy the requirement of the Sixth Amendment. He must competently perform.

This record shows that Petitioner did not waive at any time the right to be represented by counsel. It shows

that on examination of the jury he specifically stated that he had no objection (in the absence of the counsel employed for him) to other defense lawyers examining the jurors for him so long as he did not waive any of his rights in so doing. The record further shows that he asked permission to introduce other counsel, Mr. Bernard of Detroit, Michigan, but that Mr. Bernard did not show up. The record further shows that Jennings, the lawyer employed for him, was drunk, and drank continuously.

Has the court no duty under such circumstances?

The Tenth Circuit Court of Appeals said in *Zahn* v. *Hudspeth*, 102 F. 2d 759, 761:

> "But a defendant may waive the right, provided it is waived intelligently, understandingly, and in a competent manner, and the duty rests upon the trial court to determine whether it is waived in that manner."

Here the Petitioner made no waiver at all. Here his counsel was drunk, and drinking constantly, and Petitioner asked and was granted permission to introduce other counsel, who did not in fact show up. To say that the trial court had no intimation of what was going on is to close one's eyes and mind to perfectly obvious conditions.

The provision of the Sixth Amendment is not satisfied under such circumstances, as pointed out by Mr. Justice Black in *Avery* v. *State of Alabama, supra.*

Respectfully submitted,

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BOWERSOCK, FIZZELL & RHODES,
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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 520

CASSIUS MCDONALD, PETITIONER

v.

ROBERT H. HUDSPETH, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 381–392) is reported at 120 F. (2d) 962. The findings of fact and conclusions of law of the District Court (R. 79–82) are unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 12, 1941 (R. 392), and a petition for rehearing was denied July 17, 1941 (R. 404). The petition for writ of certiorari was filed August 18, 1941. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States District Court for the District of Minnesota was without jurisdiction, under the Sixth Amendment, to try petitioner upon an indictment charging a conspiracy in violation of the Federal Kidnapping Act.

2. Whether petitioner was denied the effective assistance of counsel.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to * * * trial, by an impartial jury of the State and district wherein the crime shall have been committed.

The pertinent provisions of the Federal Kidnapping Act are—

18 U. S. C., sec. 408a:

> Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ranson or reward or otherwise, * * * shall, upon conviction, be punished * * *.

18 U. S. C., sec. 408c (as it was at the time petitioner was indicted):

> If two or more persons enter into an agreement, confederation, or conspiracy to violate the provisions of sections 408a and 408b of this title, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as provided for by said sections.

STATEMENT

Petitioner was convicted (R. 41) in the United States District Court for the District of Minnesota upon an indictment charging a conspiracy in violation of the Federal Kidnapping Act, in connection with the kidnapping of one Edward George Bremer (R. 54–61). As shown by the indictment (R. 37–40) and the evidence at the criminal trial (*McDonald* v. *United States,* 89 F. (2d) 128 (C. C. A. 8)), petitioner's role in the kidnapping scheme was that of money changer, there being evidence that he made several trips from Miami to Havana to exchange ransom money for gold and other United States currency. He was sentenced to fifteen years' imprisonment (R. 42). Upon appeal petitioner's conviction was affirmed (*McDonald* v. *United States, supra*), and after a rehearing was refused, this Court denied his petition for writ of certiorari (301 U. S. 697). This Court also denied a petition for rehearing (302 U. S. 773) and a petition for a writ of error *coram nobis* (303

U. S. 622). Neither of the questions now presented was urged at any stage of these proceedings (Pet. 4).

The present proceeding arises upon an application for writ of *habeas corpus* filed by petitioner in the United States District Court for the District of Kansas seeking his release from the Leavenworth Penitentiary, where he had been confined for two and one-half years (R. 9–17, 21–23, 25–30, 86).

The evidence at the *habeas corpus* proceeding bearing upon petitioner's claim that he was denied the effective assistance of counsel may be summarized as follows:

Petitioner was represented prior to trial and after the verdict of guilty by John A. Burns, a member of the Bar of the United States District Court for the District of Minnesota (R. 88–90, 232–233). At the trial petitioner was represented by Everett Jennings, an attorney of Chicago, Illinois, who had been retained by petitioner's wife and paid $5,000 for his services (R. 226–229). Jennings was present throughout the trial except for twenty minutes at the opening of court on the day the jurors were selected (R. 243–244; see also R. 197–198, 216). At that time petitioner consented that attorneys for the other defendants represent him in connection with the impaneling of the jury (R. 244).

The alleged intoxication of petitioner's counsel and his asserted incapacity effectively to repre-

sent him was testified to by petitioner (R. 106–109) and his testimony was substantiated to a certain extent by that of attorneys representing other defendants (R. 181–189, 196–220). Any indication of intoxication or incapacity was, however, denied by the trial judge (R. 165–173), the then United States Attorney who conducted the trial, now a United States District Judge (R. 176–181), the Assistant United States Attorney who aided him (R. 162–165), and four deputy United States Marshals who were present in the courtroom throughout the trial (R. 173–176, 181, 187–188). In addition there was introduced by respondent a transcript of the proceedings at petitioner's trial which indicates to us that Jennings conducted petitioner's defense capably and vigorously (R. 242–316). While petitioner testified that on several occasions his counsel was led out of the courtroom by a marshal (R. 106), this testimony is not supported by that of any of the marshals present or of any other witness.[1]

Petitioner admits that he never called the trial court's attention to the alleged intoxication of his counsel (R. 109, 112–113). Nor did he at any time request that court to continue the trial until he could bring in other counsel (R. 111–112, 169, 244). According to his own testimony petitioner was, at the time of trial, a man in his fifties who

[1] With reference to a particular incident to which petitioner apparently refers, see the testimony of the trial judge (R. 166, 171).

had attended two universities and had managed a personal estate in excess of one million dollars (R. 86).

The District Court held that the United States District Court for the District of Minnesota was, under the Sixth Amendment, without jurisdiction to try petitioner and that petitioner's attorney was so under the influence of liquor throughout the trial that he was wholly incompetent and ineffective on petitioner's behalf, with the result that the latter was denied his constitutional right to the assistance of counsel (R. 79–82). The court thereupon ordered the petitioner discharged from custody (R. 83). Upon appeal the Circuit Court of Appeals unanimously reversed the decision of the District Court (R. 381–392) and directed that petitioner be returned to the custody of respondent (R. 392).

ARGUMENT

I

Petitioner contends that under the Sixth Amendment the United States District Court for the District of Minnesota lacked jurisdiction to try him, apparently because the only overt acts attributed to him in the indictment were charged to have been committed in Florida and Cuba and because, notwithstanding that the indictment charged him with conspiring with the kidnappers in Minnesota, there was no proof at the criminal trial that he was ever in Minnesota or in com-

munication with anyone there (Pet. 11–15). Petitioner's contention misconceives fundamental principles well established in the law of conspiracy.[2]

It is elementary that all of the parties in a conspiracy indictment may be tried either in the jurisdiction in which the illicit understanding was entered into or in any district in which any of the conspirators committed any of the overt acts named in the indictment. *Hyde* v. *United States,* 225 U. S. 347; *Brown* v. *Elliott,* 225 U. S. 392, 402; *Hyde* v. *Shine,* 199 U. S. 62, 76.[3] It is equally well settled that one who knowingly cooperates to further the objects of a conspiracy becomes a party thereto, and this regardless of whether all the conspirators are acquainted with each other or had direct contact with all the others. *Allen* v. *United States,* 4 F. (2d) 688, 698 (C. C. A. 7), certiorari denied *sub nom. Mullen* v.

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[2] Since petitioner's contention is clearly without merit, it is assumed *arguendo* that the question presented need not be raised *in limine* (*Strewl* v. *United States*, 99 F. (2d) 474, 477–478 (C. C. A. 2)), and that it may be examined on *habeas corpus* even though, in part at least, it involves an inquiry into facts which essentially were the subject of consideration in the petitioner's criminal trial (Cf., however, *Bowen* v. *Johnston*, 306 U. S. 19, 25–26).

[3] See also *Palmero* v. *United States*, 112 F. (2d) 922, 926 (C. C. A. 1); *Chew* v. *United States*, 9 F. (2d) 348 (C. C. A. 8); *Sloan* v. *United States*, 31 F. (2d) 902 (C. C. A. 8); *Yenkichi Ito* v. *United States*, 64 F. (2d) 73, 76 (C. C. A. 9); *Shea* v. *United States*, 236 Fed. 97 (C. C. A. 6); *United States* v. *Wells*, 192 Fed. 870.

United States, 267 U. S. 598; *Booth* v. *United States,* 57 F. (2d) 192, 197 (C. C. A. 10); *Martin* v. *United States,* 100 F. (2d) 490, 496 (C. C. A. 10), certiorari denied, 306 U. S. 649. A conspirator need not understand the entire scope of the conspiracy and his knowledge may be limited as to its extent and details, it being sufficient if one becomes a member of a conspiracy knowing its purposes in a general way and acts with his fellow conspirators to a greater or lesser extent. *McDonnell* v. *United States,* 19 F. (2d) 801, 803 (C. C. A. 1), certiorari denied, 275 U. S. 551; *Galatas* v. *United States,* 80 F. (2d) 15, 23 (C. C. A. 8), certiorari denied, 297 U. S. 711; *Craig* v. *United States,* 81 F. (2d) 816, 822 (C. C. A. 9), certiorari denied, 298 U. S. 690; *Marino* v. *United States,* 91 F. (2d) 691, 696 (C. C. A. 9), certiorari denied, *sub nom. Gullo* v. *United States,* 302 U. S. 764. One joining a criminal conspiracy becomes equally as guilty as those who were in it at its formation and is equally as accountable for the overt acts performed prior to his membership in the conspiracy as are the original conspirators. *Manton* v. *United States,* 107 F. (2d) 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664; *McDonald* v. *United States,* 89 F. (2d) 128, 133 (C. C. A. 8), *supra; Laska* v. *United States,* 82 F. (2d) 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Marino* v. *United States,* 91 F. (2d) 691, 696 (C. C. A. 9); *Baker* v. *United States,* 21 F. (2d) 903, 905 (C. C. A. 4), certiorari denied, 276 U. S. 621.

On the face of the indictment it cannot be doubted that the United States District Court for the District of Minnesota had jurisdiction to try petitioner. The indictment charged a conspiracy which involved not only the kidnaping of Bremer and his transportation and holding for ransom but the exchanging of the ransom money for safe money (R. 35–37), petitioner's role being that of exchanger of the ransom money (R. 40). The indictment specifically alleged that the conspiracy was entered into in the District of Minnesota as well as elsewhere; that petitioner was one of the conspirators (R. 34), and that overt acts relating to the kidnaping occurred in that district (R. 37–39).

While the proof did not disclose that petitioner joined the conspiracy at its inception (*McDonald* v. *United States,* 89 F. (2d) at 132), it was determined in his criminal proceeding that the conspiracy endured until the ransom money was exchanged; that there was sufficient evidence to warrant the jury in finding that petitioner came into the conspiracy before its final object had been accomplished (*id.,* p. 133), and that in exchanging the ransom money he acted with knowledge (*id.,* pp. 138–139). It also cannot be denied that the evidence disclosed that Bremer was kidnaped in St. Paul (*id.,* p. 131) and therefore that the overt acts relating to the kidnapping were committed in that district.

Consequently it is abundantly clear that both on the face of the indictment and under the proof the United States District Court for the District of Minnesota had jurisdiction to try petitioner.

II

Petitioner's contention that he was denied the effective assistance of counsel (Pet. 15–18) must be measured by the rule that when collaterally attacked a judgment of conviction carries with it a presumption of regularity, and that consequently a heavy burden of proof rests upon a petitioner assailing such a judgment. *Johnson* v. *Zerbst,* 304 U. S. 458, 466. In the light of these salient principles, we submit that the District Judge was clearly unjustified in finding from the testimony that petitioner had established by a preponderance of the evidence that his attorney was "constantly incapacitated and under the influence of liquor throughout the trial to the extent that he was wholly incompetent and ineffective on petitioner's behalf" (R. 82). Even if the testimony on behalf of the petitioner went so far, which we do not believe it does, the alleged drunkenness of petitioner's attorney and his incapacity were unequivocally denied by the trial judge, the United States Attorney, the Assistant United States Attorney and four Deputy United States Marshals. Their testimony was supported not only by the presumption of regularity inherent in the judg-

ment of conviction but by what seems to us to be undeniable evidence of skill and ability on the part of his counsel in conducting petitioner's defense reflected in the transcript of the proceedings at the criminal trial introduced by the respondent. Petitioner indubitably did not meet his burden of proof.

Moreover, the *habeas corpus* court omitted to find certain indisputable facts which rendered nugatory any holding that petitioner was denied the effective assistance of counsel. These are that petitioner's counsel was not appointed by the court but was selected by his wife and paid $5,000 for his services and that, although petitioner is a man of intelligence, education and wide business experience, he at no time called the attention of the trial judge to the alleged drunkenness of his counsel or requested that he be permited to have other counsel represent him. If petitioner lacked the effective assistance of counsel because of intoxication or mismanagement of his defense, which plainly he did not, this certainly was not, as the Circuit Court of Appeals has pointed out (R. 39), because of any denial of such a right.

Petitioner and the District Judge place some emphasis upon the fact that petitioner's attorney did not allow him to testify and did not place on the stand witnesses he had produced (Pet. 17, R. 82). This may, of course, have been motivated by a complex of strategical considerations, and there

is nothing in the record which discloses that petitioner made any claim to the trial court that his interests were not being protected.

CONCLUSION

The petition for writ of certiorari presents no question requiring review by this Court. It is therefore respectfully submitted that it should be denied.

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